IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1243

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SUPREME COURT, U.S.

WARDEN, Greenhaven Correctional Facility, SUPERINTENDENT, Auburn Correctional Facility, SUPERINTENDENT, Greenhaven Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Brief for Respondent in Opposition

AMANDA POTTERFIELD
DAVID C. LEVEN
PRISONERS' LEGAL SERVICES
OF NEW YORK
Attorneys for Respondent
20 Vesey Street 8th Floor
New York, New York 10007
(212) 285-0370

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Brief for Respondent in Opposition

Respondent Jose Laureano respectfully submits that there are no special or important reasons to review on writ of certiorari the order of the United States Court of Appeals for the Second Circuit, which affirmed the decision of the United States District Court for the Southern District granting respondent's petition for a writ of habeas corpus. The order of the Court of Appeals is based upon a finding that the facts appearing on the state court record supported respondent's claim that he was prejudiced by the joint representation of him and his co-defendants by one attorney. The case presents no holding in conflict with a decision of any other Court of Appeals, nor with any decision of this Court. Rule 19(1)(a) of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The order of the Second Circuit Court of Appeals, reproduced in petitioner's appendix at pages 1a-2a, affirmed the order of the District Court on the opinion of the Hon. Morris E. Lasker, reproduced in petitioner's appendix at pages 3a-9a. Judge Lasker's opinion in turn incorporated and affirmed the Magistrate's Report, reproduced in the appendix to the brief of respondent Jose Bonilla, at pages 1a-35a.

QUESTION PRESENTED

Whether the Court of Appeals correctly granted the petition for writ of habeas corpus on the ground that respondent has shown that he was prejudiced by the joint representation of him and his co-defendants by one attorney at his criminal trial.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to effective assistance of counsel in the Sixth Amendment to the United States Constitution, set forth at pages 2 and 3 of the petition, and the right to due process of law in the Fourteenth Amendment to the United States Constitution, set forth at page 3 of the petition.

STATEMENT OF THE CASE

Respondent respectfully submits that the question presented in the petition is out of the context of the Court of Appeals' order, which is strongly grounded in the facts as they occurred during the state court trial. Because these facts are essential to an understanding of the opinions below, the evidence at trial is outlined first, followed by a discussion of the prior proceedings in the state and federal courts.

The Evidence at Trial

On the night of January 28, 1972, three friends, Jose Bonilla, Fernando Bermudez and Jose Laureano, were walking along the sidewalk on Simpson Street in the Bronx. William Travieso, who lived nearby, was walking in the opposite direction, and jostled Bonilla as he passed the three friends. Words were exchanged and a fist fight erupted.

Travieso's friends and family came out into the street to intervene in the fighting. Travieso was knocked to the ground and someone was on top of him. At least one person had a knife and Travieso was stabbed. He died of a single stab wound.

Respondent Jose Laureano was tried and convicted in New York Supreme Court for Bronx County with his two co-defendants, Bermudez and Bonilla, in March, 1974. Each of the respondents was charged with intentional murder and possession of a weapon. All three were represented by one retained attorney, Stanley Siegel.

The prosecution witnesses consisted primarily of the family and friends of Travieso who intervened in the fight. Different witnesses saw different things, and the sequence of events was confused, at best.

Despite the confusion, the major movements in the fight are described similarly by the prosecution witnesses. The basic difference among the testimony of the prosecution witnesses is that the Travieso's seem to ascribe to Bermudez the same actions that are ascribed to Bonilla by the Torres'.

None of the witnesses placed Laureano in a position where he could possibly have been the person who stabbed William Travieso. Several witnesses placed Laureano on the sidewalk, behaving like a spectator at a boxing match.

The prosecution's theory was that each defendant was guilty of "acting in concert" to kill Travieso, and no attempt was made to establish which person had inflicted the stab wound.

The Appeals

Laureano appealed from the judgment of conviction claiming that he had been denied effective assistance of counsel as a result of the joint representation of all three defendants. His conviction was affirmed by the Appellate Division of the New York Supreme Court, First Department, 46 A.D.2d 1014 (1974), and leave to appeal to the Court of Appeals was denied on January 22, 1975.

The Magistrate and the District Court

Laureano presented the same claim to the United States District Court for the Southern District of New York in his petition for a writ of habeas corpus filed in February, 1978. The petition was consolidated with that of respondent Bermudez and referred to a Magistrate.

The District Court and the Magistrate found that the prejudice to respondent Laureano resulting from the joint representation of counsel was apparent on the face of the state court record. Opinion of the District Court, petitioner's appendix, at pages 8a-9a; Magistrate's Report, respondent Bonilla's appendix, at pages 22a-25a, 28a-32a.

Specifically, the District Court ruled that the unified defense presented by defense counsel that none of the three respondents had stabbed the victim was "implausible" and "amounted to no defense at all" on the facts of this case. Opinion of the District Court, petitioner's appendix, at page 8a. Since the victim had been stabbed

only once, the prosecution's evidence varied as to the participation of each of the respondents, and because the prosecution was required to prove that each respondent intended to commit murder, the only viable defense for each defendant was to dissociate himself from the murder. Ibid.

The threshold question before the Magistrate and the District Court was to allocate the burden of proving prejudice resulting from the joint representation. Decisions of the Second Circuit Court of Appeals made the existence and adequacy of a pre-trial inquiry by the trial judge relevant to the allocation of this burden of proof.[1] The state court record contained no indication that any inquiry had been made by the trial court. During the habeas proceedings, however, affidavits were submitted by the state trial judge and by defense counsel Siegel, containing contradictory allegations as to whether an inquiry had been made.

The trial judge's first affidavit, sworn in May, 1977, stated that it was he who had raised the issue with defense counsel at an off-the-record conference, and that Siegel had assured the judge that no conflict of interest existed among the defenses of the three co-defendants. It was this first affidavit that was the basis for the Magistrate's ruling that the alleged inquiry was insufficient to establish consent by respondents to the joint representation of counsel. Magistrate's Report, respondent Bonilla's appendix, at page 13a.

After the issuance of the Magistrate's report, the trial judge submitted a second affidavit, sworn in April, 1979. In this second affidavit, the trial judge remembers that defense counsel had given his assurance that no conflict of interest existed in open court, in the presence of all three respondents. The judge further stated in his second

[1] See discussion in Reasons for Denying the Writ, at page 7, infra.

affidavit that he "believe[d]" he questioned the three respondents directly and that they all agreed to the joint representation.

The District Court considered the second affidavit of the trial judge, noting that it was filed "[s]omewhat surprisingly" after the issuance of the Magistrate's Report. Opinion of the District Court, petitioner's appendix, at page 6-a. This second affidavit did not convince the District Court to modify the Magistrate's conclusion.

This Court's decision in Holloway v. Arkansas, 435 U.S. 478 (1978), rendered defense counsel Siegel's affidavit relevant to the extent that it might describe the kind of timely motion for separate counsel that would invoke a presumption of prejudice. Siegel's recollection contained in his affidavit was that he had raised the possibility of a conflict of interest with the trial judge in an off-the-record conference before the trial, and that the trial judge had responded by ordering Siegel to proceed with the trial.

The District Court found that this affidavit of defense counsel probably was not sufficient to bring the case within the ruling of Holloway v. Arkansas, supra. Opinion of the District Court, petitioner's appendix, at page 7a.

Since the District Court and the Magistrate held that prejudice had been proven regardless of which party bore the burden of proof on that issue, the allegations in the affidavits were found not to be significant to the disposition of the case. Opinion of the District Court, petitioner's appendix, at page 6a; Magistrate's Report, respondent Bonilla's appendix, at page 13a.

The Court of Appeals' Order

The questions presented to the Court of Appeals by the State were whether state remedies had been exhausted and, whether the respondents had been prejudiced by the joint representation of counsel. The Court of Appeals affirmed the granting of the petitions for writ of habeas corpus on the opinion of the District Court.

REASONS FOR DENYING THE WRIT

The State grounds its application for a writ of certiorari on the notion that the order of the Court of Appeals constitutes a ruling that respondents could not consent o the joint representation of counsel. In framing the question in this way, the State relies upon the inquiry allegedly made by the trial court into the possibility of a conflict of interest and the alleged acquiescence by respondents to joint representation by one attorney.

Yet the alleged consent of respondents to joint representation as described by respondents is relevant only to the allocation of the burden of proving prejudice in the habeas proceedings. Colon v. Fogg, 603 F.2d 403 (1979); Salomon v. LaVallee, 575 F.2d 1051 (1978); Kaplan v. Bombard 573 F.2d 708 (1978). Since the courts below found that prejudice to respondents was apparent, regardless of which party bore the burden of proof, the trial court's alleged inquiry and the alleged consent by respondents was not material to the issue before the Court of Appeals.

If the State means to raise in this Court, for the first time, the proposition that respondents' alleged acquiescence to the joint representation of counsel was a waiver of their Sixth Amendment right to effective assistance of

counsel, the answer is clear. The alleged inquiry made by the trial court is not sufficient to demonstrate a knowing and intelligent waiver by respondents of a constitutional right. Johnson v. Zerbst, 304 U.S. 458 (1938).

There has never been any issue presented in this case as to whether respondents could have consented to the joint representation of counsel. Of course, they could have consented, and assuming the contents of the trial judge's second affidavit to be true, may have consented. However, the allegation that they gave their uneducated acquiescence to joint representation of counsel is obviously insufficient to meet the State's burden on the affirmative defense of waiver.

The unique facts of this case were considered by the Court of Appeals and determined by application of well-established principles. No novel issue was presented to or decided by the Court of Appeals. Certainly, the courts below were not presented with any claim of waiver of a constitutional right, nor would the facts of this case support any such claim.

The State also asserts that the Court of Appeals' order is in conflict with this Court's decision in Holloway v. Arkansas, 435 U.S. 475 (1978) without indicating where the conflict may lie. The District Court noted in its opinion that the allegations in defense counsel Siegel's affidavit would not, even if true, be sufficient to invoke the presumption of prejudice provided for in Holloway where a timely motion for separate counsel is denied.

The finding of the District Court, which was affirmed by the order of the Court of Appeals, was that prejudice to respondent is apparent from the record. Thus, the Holloway decision is inapplicable to, but not inconsistent with the order of the Court of Appeals.

The questions presented to the Court of Appeals by the State were whether state remedies had been exhausted as required by 28 U.S.C. §2254 and whether the respondents had been prejudiced by the joint representation. The Court of Appeals answered both of those questions in the affirmative. Those rulings are entirely consistent with the decisions of other Courts of Appeal on the same issue and specifically with the decisions in the cases listed on page 7 of the petition.

Respondent Jose Laureano respectfully submits that this case is not appropriate for review on writ of certiorari.

CONCLUSION

FOR ALL OF THE REASONS STATED ABOVE, THE WRIT SHOULD BE DENIED.

Dated: New York, New York
February 27, 1980

Amanda Potterfield

AMANDA POTTERFIELD
DAVID C. LEVEN
PRISONERS' LEGAL SERVICES OF NEW YORK
20 Vesey Street, 8th Floor
New York, New York 10007
212-285-0370
Attorneys for Respondent

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

Linda Barnes, being duly sworn, deposes and says:

That deponent is not a party to the action and is over 18 years of age and resides at 20 Vesey Street, New York, New York.

That on February 28, 1980, deponent served the within Motion for Leave to Proceed In Forma Pauperis with Supporting Affidavit and Brief for Respondents In Opposition, upon Charles Bach, Jr., Assistant District Attorney, Bronx County, 215 East 161st Street, Bronx New York 10451, Gilbert Epstein, Esq., Attorney for Respondent Bermudez, 17 John Street, New York, New York 10038; Diana Budzanoski, Legal Aid Society, 15 Park Row, New York 10038, Attorney for respondent Bonilla, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in--a post office-- official depository under the exclusive care and custody of the United States Postal Services within the State of New York

Linda Barnes

Linda Barnes

Sworn to before me this 28th day

of February, 1980.

NOTARY PUBLIC

MARJORIE A. ROSEN
Notary Public, State of New York
No. 31-4654195
Qualified in New York County
Commission Expires March 30, 19...